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2
3 UNITED STATES DISTRICT COURT

4 EASTERN DISTRICT OF WASHINGTON

5
6 VERMONT JOE PHILLIPS,

No. 13-cv-106-JPH

7 Plaintiff,

ORDER GRANTING PLAINTIFF'S
8 vs.
9 MOTION FOR SUMMARY
10 JUDGMENT

CAROLYN W. COLVIN, Acting
11 Commissioner of Social Security,

Defendant.

12 BEFORE THE COURT are cross-motions for summary judgment. ECF
13 Nos. 14 and 20. The parties have consented to proceed before a magistrate judge.
14 ECF No. 6. After reviewing the administrative record and the parties' briefs, the
court **grants** plaintiff's motion for summary judgment, **ECF No. 14**.

15 **JURISDICTION**

16 Phillips protectively applied for disability insurance benefits (DIB) on
September 21, 2009. He alleged onset beginning July 16, 2009 (Tr. 162-65).
17 Benefits were denied initially and on reconsideration (Tr. 104-06, 110-11). ALJ
Gene Duncan held a hearing on April 4, 2011 (Tr. 36-101) and issued an
18 unfavorable decision on August 22, 2011 (Tr. 22-29). The Appeals Council denied
19 review on January 14, 2013 (Tr. 1-3). The matter is now before the Court pursuant

1 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on March 13,
 2 2013. ECF Nos. 1 and 5.

STATEMENT OF FACTS

3 The facts have been presented in the administrative hearing transcript, the
 4 ALJ's decision and the parties' briefs. They are only briefly summarized here and
 5 as necessary to explain the court's decision.

6 Phillips was 56 years old at onset. He has an eleventh grade education and
 7 has worked as a hand packer, forklift operator, warehouse worker, lab courier,
 8 assembler and janitor (Tr. 38, 85-87, 187). He alleges disability based on
 9 obstructive sleep apnea, pancreatitis and arthritic knees. On appeal Phillips alleges
 the ALJ erred when he weighed the medical expert's testimony and assessed
 credibility. ECF No. 14 at 3.

SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the Act) defines disability as the "inability to
 11 engage in any substantial gainful activity by reason of any medically determinable
 12 physical or mental impairment which can be expected to result in death or which
 13 has lasted or can be expected to last for a continuous period of not less than twelve
 14 months." 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
 15 plaintiff shall be determined to be under a disability only if any impairments are of
 16 such severity that a plaintiff is not only unable to do previous work but cannot,
 17 considering plaintiff's age, education and work experiences, engage in any other
 18 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423
 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both
 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
 (9th Cir. 2001).

19 The Commissioner has established a five-step sequential evaluation process
 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step

1 one determines if the person is engaged in substantial gainful activities. If so,
2 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the
3 decision maker proceeds to step two, which determines whether plaintiff has a
4 medically severe impairment or combination of impairments. 20 C.F.R. §§
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment
6 or combination of impairments, the disability claim is denied.

7 If the impairment is severe, the evaluation proceeds to the third step, which
8 compares plaintiff's impairment with a number of listed impairments
9 acknowledged by the Commissioner to be so severe as to preclude substantial
10 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.
11 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is
13 not one conclusively presumed to be disabling, the evaluation proceeds to the
14 fourth step, which determines whether the impairment prevents plaintiff from
15 performing work which was performed in the past. If a plaintiff is able to perform
16 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§
17 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity
18 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and
19 final step in the process determines whether plaintiff is able to perform other work
in the national economy in view of plaintiff's residual functional capacity, age,
education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish a *prima facie* case
21 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.
22 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental impairment prevents the
24 performance of previous work. The burden then shifts, at step five, to the

1 Commissioner to show that (1) plaintiff can perform other substantial gainful
 2 activity and (2) a “significant number of jobs exist in the national economy” which
 3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

STANDARD OF REVIEW

4 Congress limits the scope of judicial review of a Commissioner’s decision.
 5 42 U.S.C. § 405(g). A Court must uphold the Commissioner’s decision, made
 6 through an ALJ, when the determination is not based on legal error and is
 7 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
 8 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). “The
 9 [Commissioner’s] determination that a plaintiff is not disabled will be upheld if the
 10 findings of fact are supported by substantial evidence.” *Delgado v. Heckler*, 722
 11 F.2d 570, 572 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is
 12 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th
 13 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,
 14 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a reasonable
 15 mind might accept as adequate to support a conclusion.” *Richardson v. Perales*,
 16 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and conclusions as
 17 the [Commissioner] may reasonably draw from the evidence” will also be upheld.
 18 *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court
 19 considers the record as a whole, not just the evidence supporting the decision of the
 20 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting*
Kornock v. Harris, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in
 17 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
 18 interpretation, the Court may not substitute its judgment for that of the
 19 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th
 20 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be

1 set aside if the proper legal standards were not applied in weighing the evidence
 2 and making the decision. *Brawner v. Secretary of Health and Human Services*,
 3 839 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support
 4 the administrative findings, or if there is conflicting evidence that will support a
 finding of either disability or nondisability, the finding of the Commissioner is
 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

5 ALJ'S FINDINGS

6 ALJ Duncan found Phillips was insured through December 31, 2013 (Tr. 22,
 7 24). At step one, he found Phillips did not work at SGA levels after onset on July
 16, 2009 (Tr. 24). At steps two and three, he found Phillips suffers from
 8 obstructive sleep apnea with complaints of CPAP treatment intolerance and
 minimal arthritis of the knees, impairments that are severe but do not meet or
 9 medically equal a listed impairment (Tr. 24-25). The ALJ found Phillips less than
 10 fully credible and able to perform a range of medium work (Tr. 25, 28). At step
 11 four, the ALJ found Phillips can perform his past relevant work as a janitor (Tr.
 12 28). The ALJ concluded Phillips was not disabled from onset through the date of
 the decision (Tr. 29).

13 ISSUES

14 Phillips alleges the ALJ failed to properly weigh the medical expert's
 opinion and erred when he assessed credibility. ECF No. 14 at 3. The
 15 Commissioner admits error but alleges it is harmless. ECF No. 20 at 6-11, 13.

16 DISCUSSION

17 A. Medical expert

18 Phillips alleges the ALJ should have given more credit to the opinion of
 Alexander White, M.D., who testified at the hearing. ECF No. 14 at 3, 6-9. The
 19 Commissioner responds that the ALJ's error is harmless because the court can
 conclude from the record that the ALJ would have reached the same result absent

1 the error. ECF No. 20 at 6-7.

2 The Court agrees with Phillips.

3 In 2005 Phillips underwent a polysomnography (sleep) test (Tr. 359-66). He
4 was assessed with “severe, primarily obstructive sleep apnea” with sleep
5 “significantly fragmented”(Tr. 362); *see also* Tr. 368, noting multiple positive
6 sleep exams. Dr. White testified Phillips suffers from obstructive sleep apnea that
7 does not meet or equal a listing, and from being overweight (Tr. 49-52, 54). He
8 opined that a single episode of possible pancreatitis in 2010 would not meet the
9 twelve month duration requirement (Tr. 50). With respect to treatment for sleep
10 apnea, Dr. White stated “They tried to get a CPAP, but he didn’t tolerate the mask
so they tried to give him nasal oxygen, but apparently he claimed that didn’t help
him” (Tr. 54). Dr. White noted many people do not tolerate the mask. He observed
that in addition to the CPAP machine and nasal oxygen, the only other treatment
options appear to be weight loss and surgery (Tr. 55).

11 Dr. White adopted the RFCs by Drs. Joseph and Hoskins as “very
12 reasonable.” They opined Phillips needed rest breaks every hour due to bilateral
13 knee osteoarthritis. They note difficulty driving due to daytime sleepiness (Tr. 244-
14 248, 258-64). Dr. White added a limitation on crawling due to Phillips’ weight (Tr.
15 52-53). He further opined that Phillips would maybe be late to work three or four
16 days a month, by perhaps 30 to 60 minutes; moreover, it would be reasonable that
17 he would need two to three 30-minute naps during the day because of fatigue and
sleepiness (Tr. 59). Dr. White notes records show Phillips was sleepy during a
claim interview, also a reasonable occurrence, given Phillips’ diagnosis (Tr. 57,
193) .

18 When the ALJ incorporated Dr. White’s limitations in an RFC presented to
the VE, the VE testified these impairments would prevent work (Tr. 94).

19 Ultimately, the ALJ excluded from his RFC determination the amount of

1 time Phillips would likely be tardy and the need for naps (Tr. 25). Instead, the
 2 written RFC includes a requirement for five-minute rest periods each hour (Tr. 25),
 3 but this limitation was not included in questions to the VE (Tr. 89-90).

4 The ALJ rejected Dr. White's opinion because "assertions of possible
 5 absenteeism and tardiness are not supported as the claimant has either been
 6 working or looking for employment, and more importantly, has not sought or
 7 required (utilized the prescribed) treatment for his sleep disturbance" (Tr. 29).

8 Both are incorrect. The ALJ's reliance on Phillips' ability to work cleaning a
 9 church 25 hours a week for three to four months, alone, is not a clear and
 10 convincing reason for rejecting his subjective symptom testimony, nor does it
 11 provide substantial evidence for rejecting Dr. White's assessed limitations.

12 In *Lingenfelter*, the Court noted that it does not follow from the fact that a
 13 claimant tried to work for a short period of time and, because of his impairments,
 14 *failed*, that he did not then experience pain and limitations severe enough to
 15 preclude him from *maintaining* substantial gainful employment. *Lingenfelter v.*
Astrue, 504 F.3d 1028, 1038 (9th Cir. 2007). Indeed, we have suggested that similar
 16 evidence that a claimant tried to work and failed actually *supported* his allegations
 17 of disabling pain. *Id.*; *See Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)
 18 (affirming the ALJ's finding that the claimant was not credible, but noting that the
 19 ALJ "could easily have relied on other ... evidence in the record to reach the
 opposite conclusion. Fair attempted to work in 1981, but testified that his pain
 forced him to stop."); *see also Rosario v. Sullivan*, 875 F.Supp. 142, 146 (E.D.N.Y.
 1995) (holding that substantial evidence did not support the ALJ's decision that
 claimant was not disabled, in part because claimant's unsuccessful work attempt
 weighed in favor of a disability finding); *cf. Reddick*, 157 F.3d at 722 ("Several
 courts, including this one, have recognized that disability claimants should not be
 penalized for attempting to lead normal lives in the face of their limitations.").

1 This reason is especially unconvincing where, as in Phillips' case, he
2 attempted to work only because of extreme economic necessity. He testified he
3 gets food from the food bank and rents a room. At times he has slept in his car. He
4 has been caught sleeping in a janitor's closet a couple of times, has sometimes
5 been late for work due to sleep problems, has fallen asleep at work and been laid
6 off of several jobs. He tends to fall asleep on the job and that makes it difficult to
7 keep jobs. Phillips was able to work at a self-directed pace at his last job, including
8 taking naps, when he worked part-time cleaning a church (Tr. 38, 43, 47, 67, 70-
9 71, 74, 76-79, 186, 368, 376). Under these circumstances, it is at least as likely that
10 the claimant tried to work in spite of his symptoms, not because they were less
11 severe than alleged.

12 It is also significant that the Social Security Administration permits
13 recipients of disability benefits to work on a trial basis without the trial work
14 period adversely affecting their disability status. Specifically, when a recipient
15 works for less than nine months, the Administration does not consider the trial
16 work period as evidence that the individual is no longer disabled. *See 20 C.F.R. §*
17 *404.1592; see also Moore v. Comm'r of the Soc. Sec. Admin., 278 F.3d 920, 924-*
18 *25 (9th Cir. 2002)* ("[T]he SSA's regulations provide for a 'trial work period' in
19 which a claimant may 'test your ability to work and still be considered disabled.'"
 quoting 20 C.F.R. §404.1592)). By analogy, if working for almost nine months is
 not evidence that a disability benefit recipient is no longer disabled, then a three
 month unsuccessful work attempt is surely not a clear and convincing reason for
 finding that a claimant is not credible regarding the severity of his impairments.
 See Lingerfelter, 504 F.3d at 1039 (nine week unsuccessful work attempt not a
 clear and convincing reason for finding claimant less than credible regarding the
 severity of his impairments).

19 The ALJ also erred by attributing tardiness, absenteeism and the need for

1 naps to Phillips' attorney rather than Dr. White (Tr. 29), as the parties
2 acknowledge.

3 ***B. Credibility***

4 To aid in weighing the conflicting medical evidence, the ALJ evaluated
5 Phillips' credibility. Credibility determinations bear on evaluations of medical
6 evidence when an ALJ is presented with conflicting medical opinions or
7 inconsistency between a claimant's subjective complaints and diagnosed condition.
8 See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). It is the province of the
9 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039
10 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent
11 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
12 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's
13 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
14 Cir. 1995).

15 Phillips challenges the ALJ's negative credibility assessment. ECF No. 14 at
16 9-13. The Commissioner concedes the ALJ erred when he relied on plaintiff
17 "never" seeking or requiring medical treatment for sleep apnea and knee
18 complaints without "addressing Plaintiff's testimony that he did not have insurance
19 to see a doctor" and Dr. White's testimony with respect to CPAP and another sleep
apnea treatment tried by Phillips. ECF No. 20 at 13, Tr. 27, 40-41, 43, 46, 54, 65-
67, 69-70, 72, 77, 244.

20 Disability benefits may not be denied because of the claimant's failure to
21 obtain treatment he cannot obtain for lack of funds. See *Orn v. Astrue*, 495 F.3d
22 625, 638 (9th Cir. 2007).

23 Plaintiff's attempts at treatment failed (Tr. 69-70). In the case of a complaint
24 of pain, failure to seek treatment may be probative of credibility, because a
25 person's normal reaction is to seek relief from pain, and because modern medicine

1 is often successful in providing some relief. *Orn v. Astrue*, 495 F.3d 625, 638 (9th
2 Cir. 2007). But in the case of impairments where the stimulus to seek relief is less
3 pronounced, and where medical treatment is very unlikely to be successful, the
4 approach to credibility makes little sense. *Id.* Dr. White testified that losing weight
5 and surgery are the only two remaining options for treating Phillips' obstructive
6 sleep apnea. He lost one hundred pounds at one point but still suffers nightly. He
7 has no medical insurance and no source of income (Tr. 38, 40, 45-46, 53-58, 60-
63, 67, 69, 218). On this record the ALJ erred by finding Phillips had not sought
medical treatment for obstructive sleep apnea.
7

8 The ALJ relied on Phillips' ability to work part-time when he discounted his
credibility, which, as noted above is incorrect.
9

10 The ALJ relied on receipt of unemployment benefits when he discounted
Phillips' credibility (Tr. 28). Citing *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533
11 F.3d 1155, 1161-62 (9th Cir. 2008), the Commissioner alleges this is proper. ECF
12 No. 20 at 16. While *Carmickle* states that receipt of such benefits can undermine a
claimant's alleged inability to work fulltime, it is inapposite here where the
13 medical and vocational evidence clearly demonstrate Phillips' disability.
14

15 Because the ALJ did not provide clear and convincing reasons for excluding
Phillips' symptoms and limitations related to daytime somnolence from his RFC
16 assessment, substantial evidence does not support the assessment. *See Gallant v.*
Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) ("Because ... the ALJ had no clear or
convincing reasons for rejecting [claimant's allegations of persistent disabling
17 pain], claimant's pain should have formed a part of the ALJ's question to the
expert").
18

19 The ALJ's reasons for finding Phillips less than credible are not clear and
convincing, nor are they supported by the record. His reasons for failing to credit
Dr. White's assessed limitations are not supported by the record. The question
19

1 presented to the VE failed to include all of the limitations supported by the
2 evidence. The errors are harmful.

3 When the evidence is properly credited, it is clear Phillips is disabled and the
case should be remanded for an immediate award of benefits.

4 **CONCLUSION**

5 After review the Court finds the ALJ's decision is not supported by
substantial evidence and free of legal error.

6 **IT IS ORDERED:**

7 1. Plaintiff's motion for summary judgment, **ECF No. 14**, is granted. The
case is reversed and remanded for an immediate award of benefits.

8 2. Defendant's motion for summary judgment, ECF No. 20, is denied.

9 The District Executive is directed to file this Order, provide copies to
counsel, enter judgment in favor of plaintiff and **CLOSE** the file.

10 DATED this 7th day of February, 2014.

11 s/James P. Hutton

12 JAMES P. HUTTON

13 UNITED STATES MAGISTRATE JUDGE